MARK JAYA ENGINEERING SDN. BHD. *a*

v.

LFY CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[COMPANIES WINDING-UP NO. 42-134 OF 1988] *b*
14 OCTOBER 1989

COMPANY LAW: *Petition for winding-up - Locus standi to bring petition - Whether presence of other supporting creditors sufficient to justify winding-up order when judgment upon which petition was based had been set aside - Whether Judge can decide whether there is bona fide dispute when action for debt pending - Substitution of petitioner - Whether just in the circumstances.* *c*

The petitioner had brought this winding-up petition against the respondent on account of a default judgment. Whilst this petition was pending, the respondent has successfully set aside a judgment obtained against it by the petitioner and the respondent had also filed for a counterclaim against the petitioner. *d*

At the hearing of the petition, the respondent argued that as the basis of the petition against the respondent (i.e. the default judgment) had been extinguished, the petitioner is no longer a creditor of the respondent and has no *locus standi* to bring this petition.

The petitioner argued for the winding-up of the respondent on the grounds that the respondent was clearly insolvent (there were a number of supporting creditors including 6 judgment creditors) and as such the dispute of the debt upon which the petition is based and the question of *locus standi* therefore becomes irrelevant. Alternatively, Counsel applied for substitution of one of the supporting creditors as the petitioner. *e*

Held:

[1] It has to be taken that there is a substantial dispute in respect of the debt, else the judgment would not have been set aside. *f*

[2] The presence of other creditors indicate to a certain degree that the respondent may be unable to pay its debt.

[3] Applying *Re Lympne Investments Ltd*. - when a debt is disputed on substantial ground, the petitioner is not a "creditor" clothed with *locus standi* to present a petition even if the company was insolvent. *g*

[4] It will not be just for the Court to order the substitution as the supporting creditor would be able thereby to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply before a winding-up order could be made and had.

[5] The procedure culminating in the ending of that corporate person must have been designed to achieve an orderly mode of winding-up with sufficient checks and balances - any short cuts would only work injustice. *h*

[Petition dismissed. Substitution not allowed. Costs to the respondent to be taxed.]

i

Cases referred to:

Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd. [1989] 2 CLJ (Rep) 555

National Mutual Life Association of A/Asia Ltd. v. Oasis Developments Pty. Ltd. & Ors. ACLR 758

Mann & Anor. v. Goldstein & Anor. [1968] 2 All ER 769

Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd. [1988] 1 CLJ (Rep) 618

Re Welsh Brick Industries Ltd. [1946] 2 All ER 197

Re Lympne Investments Ltd. [1972] 2 All ER 385

Legislation referred to:

Companies Act 1965, ss. 217, 218, (2)(b), (c), 221, 224

Companies (Winding-Up) Rules, r. 33

For the respondent - Andrew Ng; M/s. Yeo & Yeo

For the petitioner & supporting creditors - Ong Ban Chai; M/s. Ong Ban Chai & Co.

JUDGMENT

Abu Mansor Ali J:

By their petition dated 30 September 1988 the petitioner applied that the respondent be wound up, that a liquidator be appointed and that the petitioner and the supporting creditors be allowed costs. The respondent company opposes the petition. I heard argument after which I reserved judgment. My judgment is as follows.

The respondent company, LFY Construction Sdn. Bhd. was incorporated as a limited company on 23 November 1972 under the Companies Act 1965 with an authorised capital of RM3,000,000 divided into 3,000,000 shares of RM1. The paid up capital was RM1,000,000.

The petitioner says the respondent company is indebted to the petitioner for the sum of RM54,115.75 together with interest at 8% per annum from 6 May 1985 to the date of realisation. On 8 September 1988 the petitioner's solicitors, Messrs. Ong Ban Chai & Co. served on the respondent company a copy of the statutory notice dated 6 September 1988 under s. 218 of the Companies Act 1965 at the respondent's registered office. The respondent is required to pay the said sum within 21 days but no payment was received. The petitioner says that the company was therefore unable to pay its debts. The petitioner therefore asked the Court for the orders sought for.

Mr. Ong Ban Chai for the petitioner in open Court, in applying the orders prayed for, also handed in a list of supporting creditors (P1) whose total claim amounts to 2.3 million. Of the supporting creditors, four at p 2 of (P1) and two at p. 3 are also judgment creditors. The rest are creditors who have yet to obtain judgments.

Mr. Ong Ban Chai further submitted that apart from the petitioner and the supporting creditors, the respondent was also suffering from execution pursuant to a judgment obtained by Wake Sdn. Bhd. for the sum of RM160,645.02 and execution was unsatisfied. He submitted that with all these any dispute on the petitioner's debt has become irrelevant because the respondent is presumed insolvent under s. 218(2)(b) or (c) of the Companies Act 1965. He says since the intended execution was void under s. 224 of the Companies Act 1965, the petitioner applied for and was granted a Provisional Receiver under s. 231 of the Act.

For the proposition that the respondent was insolvent, the petitioner relied on *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd.* [1989] 2 CLJ (Rep) 555 which held that a company may be wound up when the evidence is overwhelming

that a company is unable to pay its debt. He also cited *National Mutual Life Association of A/Asia Ltd. v. Oasis Developments Pty Ltd. & Ors.* ACLR 758 where it was held that a petition relying on that "the company was unable to pay its debts" may rely on the fact that the debtors had persistently failed to pay its due debts after demands in that regard.

In this case Mr. Ong Ban Chai says the petitioner therefore prays that on the facts the Court should wind up the respondent.

Mr. Ng, however, opposed the petition. He says that only a creditor under s. 217 of the Companies Act 1965 can present petition.

The respondent's Counsel recounted that on 7 December 1988 the respondent applied to strike out this present petition. The respondent was unsuccessful because the respondent's application to have the in default judgment in the Kuala Lumpur High Court in C.S. 24-3723/86 (K.L. judgment) set aside had not at that time been heard. The respondent was ordered to only pursue the application in Johore Bahru after the Kuala Lumpur judgment had been set aside if that could be obtained. Now the position is that the Kuala Lumpur judgment had been set aside on 23 February 1989. The respondent company also has a counterclaim against the petitioner in the Kuala Lumpur suit for the sum of RM123,703.20 and it is pending in the High Court. Counsel submitted that since the basis of the petitioner applying for a winding up, the Kuala Lumpur judgment, had been extinguished the petitioner is no longer a 'creditor' of the company and he no longer has *locus standi* to proceed with the petition. Counsel cited *Mann & Anor. v. Goldstein & Anor.* [1968] 2 All ER 769 which held that as the existence of a debt on which each winding up was founded was disputed on grounds showing substantial defence requiring investigation the petitioner has not established that he was a creditor and he had no *locus standi* to present the petition. Counsel says that it was a precondition that the petitioner be a creditor and this criteria be first satisfied before the second question that the company is insolvent can be considered.

Counsel for the respondent cited *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth* [1973] Sdn. Bhd. [1988] 1 CLJ (Rep) 618 where it was held that in the absence of a judgment debt the petitioner is not a "creditor" and had no *locus standi*. Hence application to have the petition struck out was allowed. Similarly in this present case, since the default judgment in the Kuala Lumpur case had been set aside there was, therefore, he submitted no basis for the petition to wind up and he duly applied for the dismissal of the petition.

In reply Mr. Ong Ban Chai replied that the authorities on *locus standi* only holds good if there are no supporting creditors. He urged the Court to distinguish the cited case with the facts before the Court. In our present petition, there are supporting creditors and six of them are judgment creditors. No doubt under s. 217 of the Companies Act a petition must be presented by a creditor but he submits a "creditor" includes a contingent creditor. He says this must be so since, in considering whether a company should be wound up under s. 218(a)(b) or (c) of the Companies Act 1965, the Court may take into account not only present but contingent debt in coming to a finding that the company is unable to pay its debts.

Alternatively, if the Court so find that the present petitioner has no *locus standi* then since he is also representing the supporting creditors, Counsel applied, on behalf of the supporting creditors, that under r. 33 of the Companies (Winding-Up) Rules 1972, the Court substitutes the first judgment creditor, the Anglo American Corporation Sdn. Bhd., as petitioner. He therefore applied for such substitution.

As was submitted by Counsel for the respondent he was taken by surprise in the matter of the last submission. The Court agreed the point was an afterthought by Counsel for the petitioner. Be that as it may, I think the point deserves consideration.

I therefore allowed petitioner's Counsel to expand on it. As he said in the authorities cited by Counsel for the respondent, there were no supporting creditors and therefore no question of r. 33 applying. He cited *Re Welsh Brick Industries Ltd*. [1946] CA 2 All ER 197 where it was held that inspite of the fact that unconditional leave to defend had been granted in the King's Bench action, it was competent for the Judge in the winding up Court to go into the evidence which was before him to consider whether or not there was a *bona fide* dispute. The Registrar's order was a matter which the winding up Court would take into consideration, but it did not preclude the Judge from finding, as a fact, that there was no *bona fide* dispute as to the debt. In further support of his application that the first judgment debtor be substituted, petitioner's Counsel urged the Court to peruse s. 221 of the Companies Act 1965 and applied that the Court may make an order which is just.

I find the petitioner's application to substitute the first judgment creditor in place of the petitioner caused me some difficulty. The difficulty arises because *Re Welsh Brick Industries Ltd.* (*supra*) is far from the authority to have the petitioner substituted. What that authority says is that inspite of the dispute it did not preclude the Judge from finding that there was no *bona fide* dispute. It means if a winding up is to be made, it is still incumbent on the Court to consider the Kuala Lumpur dispute to see whether it is *bona fide*.

In this case, it had to be taken that there was substantial dispute else the Kuala Lumpur Court would not, by order, have allowed the respondent's application to have the default judgment set aside. But there are other judgment creditors not satisfied indicating to a certain degree that the respondent may be unable to pay its debt and is therefore insolvent. I lean in favour of *Re Lympne Investments Ltd.* [1972] 2 All ER 385, 389 which decided that when a debt was disputed on substantial ground the petitioner was not a "creditor" clothed with *locus standi* to present a petition **even if the company was insolvent** (Emphasis is mine). Consistent with the principle in that case *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth* [1973] Sdn. Bhd. (*supra*) was also decided echoing that decision.

I also refuse the petitioner's Counsel's application to substitute the first judgment creditor because considered on any angle one arrives at the answer it is unjust to do so. "Just" should not only be for the petitioner and the supporting creditors but there is a higher consideration that by granting that application, the 1st judgment creditor would be able thereby to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply before a winding up order could be made and had. The procedure culminating in the ending of that corporate person must have been designed to achieve an orderly mode of winding up with sufficient checks and balances. I rule any short cuts would only work in injustice.

For reason stated above, I therefore allow the objection of the respondent and dismiss the petition for winding up with costs to the respondent to be taxed.

Also found at [1990] 1 CLJ 518